COURT OF APPEALS
DECISION
DATED AND RELEASED

July 24, 1996

No. 95-2702-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORY D. WOOD,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

NETTESHEIM, J. Cory D. Wood appeals from a judgment of conviction for disorderly conduct, resisting an officer, possession of a controlled substance with intent to deliver and possession of a short-barrelled shotgun. On appeal, Wood challenges the warrantless search of his apartment. Because we conclude that the search was legal under the emergency doctrine,

we reject Wood's argument and affirm the judgment of conviction and the order denying postconviction relief.

FACTS

On January 27, 1995, Kurt Schoeni, a police officer for the city of Oshkosh, responded to a call reporting a disturbance in Wood's apartment and arrived shortly after an Officer Hill. When Schoeni arrived at the apartment complex, he immediately heard loud music and arguing emanating from one of the apartments. He ascended the stairs and saw a person at the top of the stairs. When this person spotted Schoeni, he ran into the apartment. At the top of the stairs, Schoeni noticed two small towels with burn marks draped over the railing in the hallway outside of the apartment.

Hill joined Schoeni at the door of the apartment, and they both stood and listened to the argument. The officers "heard a lot of swearing and yelling" and "items … being thrown against the walls in the apartment." They also heard glass breaking during what they characterized as a "[p]hysical altercation." When the officers knocked on the door, a person from inside responded to ask who it was. Schoeni identified himself as a police officer for the city of Oshkosh. The person uttered some obscenities and told the officers to leave.

Schoeni knocked on the door again several times and informed the people inside that neighbors were complaining about the loud noise and that the officers needed to determine the nature of the disturbance before they could leave. At that time, Hill stayed outside the apartment door, while Schoeni went

to the unit of the individual who initially reported the disturbance. The woman who reported the disturbance said that the ruckus had been occurring off and on for several days and that it was of such a magnitude that items were falling off of the adjoining wall.

When Schoeni returned to speak with Hill, he heard what sounded like the click of a "shotgun being racked." Schoeni passed that information on to Hill, and the two again tried to make contact with someone inside. Schoeni left to ask the neighbor how to contact the manager of the apartment building. The officers called the apartment manager, who arrived shortly thereafter. The officers informed the manager of the circumstances and asked the manager to ascertain whether he thought damage was being done to the property. While standing outside of the apartment, they heard several objects being moved around and the sound of "glass items being stepped on and broken." Schoeni estimated that they waited outside trying to contact someone for approximately fifteen or twenty minutes. The officers decided to enter because it had now become very silent in the apartment.

The officers enlisted the assistance of the apartment manager in order to enter the apartment. When no one responded after the manager identified himself, he used the pass key to open the door. Upon entering the unit, the officers noticed the living room in "total disarray" with furniture turned upside down and "what appeared to be blood splattered on the wall" and more blood on a roll of toilet paper on a coffee table. Schoeni then identified himself as a police officer and asked anyone in the apartment to come

out of the rear rooms. When no one responded, Schoeni notified his supervisor of the situation, who advised that the officers "were to continue to check on the welfare of [the] individuals" in the apartment.

The officers spotted shotgun shells on the floor outside a bedroom. Hill and a third officer had their weapons drawn and stayed in the hallway while Schoeni opened a bedroom door. Inside, they saw shotgun shells and an individual, later identified as Wood, wrapped in a blanket in the middle of a bed. When Wood moved, the officers ordered him to show his hands before they approached him. Once Schoeni made physical contact with Wood, a struggle began, and Schoeni maneuvered him to the floor, where he handcuffed him. During this time, Hill had handcuffed another individual discovered in the apartment. The officers removed both suspects to the living room.

The officers then returned to the bedroom to retrieve a shotgun with its end sticking out from between the mattress and the bed frame about a foot from where Wood had been lying. The officers also removed ten to twelve shotgun shells that they found between the mattress and frame. As they were removing the shells, they saw a blue baggie on the mattress with suspected marijuana in it.

The State charged Wood with one count each of disorderly conduct, resisting an officer, possession of tetrahydrocannabinol with intent to deliver and possession of a short-barrelled shotgun in violation of §§ 947.01, 946.41(1), 161.41(1)(h)1 and 941.28(2), STATS. After the trial court's denial of his motion to suppress the evidence based on a warrantless search of his apartment,

Wood entered a no contest plea to the charged offenses on March 13, 1995. The trial court sentenced Wood to concurrent two and one-half year prison terms on counts three and four, and to consecutive probation for a concurrent period of two years on counts one and two. Wood subsequently filed a postconviction motion for relief from the judgment, which the court denied on September 21, 1995. Wood appeals, challenging the trial court's suppression ruling.

DISCUSSION

The Fourth Amendment to the United States Constitution and Art. I, sec. 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. ***State v. Kiper,*** 193 Wis.2d 69, 80, 532 N.W.2d 698, 704 (1995). In reviewing an order denying a motion to suppress evidence obtained as a result of an unlawful search, we will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***id.*** at 79, 532 N.W.2d at 703. Whether a search and seizure satisfies constitutional demands is a question of law subject to our independent review. *See* ***id.*** at 79-80, 532 N.W.2d at 703.

A warrantless entry by police is lawful if exigent circumstances exist. *See* ***id.*** at 89, 532 N.W.2d at 707. The test to determine whether exigent circumstances exist objectively inquires "[w]hether a police officer under the

circumstances known to the officer at the time reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." ***Id.*** at 89-90, 532 N.W.2d at 707-08.

The supreme court has identified four factors which constitute the exigent circumstances required for a warrantless entry. ***Id.*** at 90, 532 N.W.2d at 708. They are: (1) an arrest made in hot pursuit, (2) a threat to safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee. ***Id.*** Wood contends that "nothing that even arguably constituted exigent circumstances was alleged to have existed" until after the police entered his apartment. We reject his argument.

Law enforcement officials may enter private property pursuant to the emergency doctrine without an arrest or a search warrant:

> to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action … and provided, further, that they do not enter with an accompanying intent to either arrest or search.

State v. Kraimer, 99 Wis.2d 306, 314, 298 N.W.2d 568, 572 (1980), *cert. denied,* 451 U.S. 973 (1981). Whether a warrantless search is proper under the emergency doctrine involves a two-step inquiry. ***State v. Prober***, 98 Wis.2d 345, 365, 297 N.W.2d 1, 12 (1980), *overruled on other grounds by* ***State v. Weide***, 155 Wis.2d 537, 455 N.W.2d 899 (1990). First, the searching officer must have subjectively been motivated by a perceived need to render aid or assistance. ***Id***. Second, a

reasonable person would objectively conclude that an emergency existed under the circumstances. ***Id***.

We conclude that both prongs of this test were satisfied in this case. When Schoeni and Hill arrived at the apartment complex, they heard shouting, fighting and breaking glass incident to what sounded like a struggle coming from Wood's apartment. Schoeni also testified that he heard the sound of a shotgun being racked followed by silence. These observations provided the officers with a subjective belief that someone in the apartment might be at risk or in need of assistance. Objectively, this was a reasonable conclusion which a person could make under these circumstances. *Cf.* ***Kiper***, 193 Wis.2d at 89-90, 532 N.W.2d at 707-08.

Wood contends, however, that even if the initial entry was legal, the officers' continued search after he and the other individual were handcuffed and in custody was illegal. We disagree because the emergency situation had not dissipated. The officers did not know how many persons were in the apartment. The blood-spattered wall and the disarray in the apartment reasonably suggested that someone in need of assistance might still be in the apartment. The officers were entitled to pursue their mission and, in the course of so doing, legitimately discovered the items in plain view.

In addition, given that: (1) Wood had physically attacked Schoeni, (2) other persons might still be on the premises, and (3) a weapon might be on the premises, the officers were also entitled to conduct a "protective sweep" of the apartment incident to the arrest of the two individuals already in custody.

See ***Maryland v. Buie,*** 494 U.S. 325 (1990). Such a search is permitted as a precautionary measure against attack even though probable cause or reasonable suspicion does not support the search. ***Id***. at 334-35; *see also* ***State v. Murdock***, 155 Wis.2d 217, 222, 455 N.W.2d 618, 620 (1990).[1]

On these various grounds, we uphold the officers' search of the apartment. We uphold the trial court's denyal of Wood's motion to suppress.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[1] The State also alternatively argues that the ensuing search was valid as one incident to arrest. Because we have upheld the search on the grounds already addressed, we do not address this further argument.